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The President's Page

By Kenneth N. Chantry

Kenneth N. Chantry

It often seems to me that the true understanding of the judicial process is not shared by all lawyers or all judges. Fundamentally that process involves an attempt to get at the truth and to arrive at what has been aptly termed a "just and right result."

This should be the sole objective of the judge, and counsel should never lose sight of that objective in the heat of controversy. The lawyer unquestionably owes entire devotion to the interest of the client, but that interest is not always best served by an excess of zeal. An overconcentration on the adversary urges of the moment may prove as disastrous in the courtroom as in the squared circle.

One of the fundamental reasons for the existence of the entire profession is the desirability of bringing to bear on a particular problem a trained mind unclouded by passion. The client is entitled to that dispassionate counsel. Goading an aroused client into a lawsuit is simplicity itself, requiring no excess of legal acumen, but by so doing a lawyer too often may be saddling his client with unnecessary burdens.

The calm of a lawyer's office may provide for the client a sort of *locus poenitentiae*—an opportunity to adjust his sights and perhaps even change his mind before getting in too deep.

No lawyer should count that day as lost which has resulted in the peaceful settlement of a controversy.

Of course, not every problem may be thus resolved and where a lawsuit is inevitable, a lawyer should not shrink from the task. He may nonetheless bring to that task a broader view of ultimate goals than is sometimes evident in and out of courtrooms.

The strength of our nation is grounded in large part on the vitality and integrity of our system of justice. It is the duty of the profession to maintain that system of justice on the high level where it so rightfully belongs.

Issue Editor—Carl Huff

Leasehold Problems in Eminent Domain

By Milnor E. Gleaves*

Milnor E. Gleaves

One of the risks of property ownership is that of condemnation for public use. One of the more serious casualties in a condemnation action, and very likely the first one to be injured in the course of the exercise of the right of eminent domain, is the lessee of a commercial or manufacturing property who finds himself in the path of an on-coming public improvement.

For example, suppose a parcel of property improved with a business building under lease is included in a complaint filed to condemn a public right-of-way. Upon the filing of the complaint, the condemnor, upon the basis of affidavits of urgent public need and opinion of value of the whole parcel, and after making a deposit of the estimated amount of compensation with the court clerk, may obtain an *ex parte* order of immediate possession.[1] Thereupon the condemning body may proceed to occupy the premises, wreck the building, and commence construction activities immediately, and it may, if necessary, secure an *ex parte* writ of assistance directing the local sheriff to back up the order. The lessee, who may or may not have had prior actual knowledge of the action, is thus faced with the immediate problem of locating and securing other suitable quarters at which to conduct his business, and of transferring thereto his stock in trade and movable equipment. He must pay for this himself, for under California law there is no provision for him to withdraw any of the amount on deposit in advance of judgment, or to recover compensation for moving costs and loss of business. If the matter is contested, the case may not be tried for as much as a year or more. Obviously, if the lessee does not have sufficient capital reserves

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[1]Cal. Const., Art. I, sec. 14.

or outside financial assistance to tide him over, he may be put out of business.

Many of these hardships, among others, are unavoidable under the present provisions of California law, and can be mitigated only through the foresight, cooperation, and patience of the administrative staffs of the public bodies involved. Some can be avoided, however, by the lessee's legal adviser if he has a thorough understanding of the rights of his client as against both the lessor and the condemning body.

I

Nature of the Lessee's Right to Compensation.

A leasehold is an interest in real property, and the lessee's ownership of that right can only be taken away from him by the same processes of condemnation that are used in the case of the fee owner. This means that he must be paid compensation for his interest, if any be due.[2] As with the owner's fee interest, market value is the measure of such compensation.[3] The value may be derived from any of three possible sources: (1) where the entire leased premises are taken, the "bonus value" of the lease, which is the difference, if any, between the *contract rent* due for the balance of the term, and the *economic rent* therefor, if the latter exceeds the former; (2) where only a portion of the leased premises is taken, an amount sufficient to cover the continuing liability for the rent attributable to the portion taken,[4] plus severance damages, if any;[5] (3) the value of any improvements affixed to the realty by the lessee which, by prior agreement with the lessor, he is entitled to remove before the lease expires.[6] The general rule is that the lessee's compensation, if any, comes out of the total award for the taking of the entire parcel as improved, and is not in addition thereto. Hence, it is not unusual to find, as a by-product of condemnation, a dispute between lessor and lessee as to the proper apportionment of the award. To eliminate the delay to the public body in such a case, our law provides that the total award may be determined first by the court or jury at the request of the plaintiff,

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[2]*Orton v. Daigler* (1933), 133 Cal. App. 112.

[3]*City of Oakland v. Pacific Coast Lumber and Mill Co.* (1915), 171 Cal. 392.

[4]*City of Pasadena v. Porter* (1927), 201 Cal. 381; *People v. Frahm* (1952), 114 Cal. App. (2d) 61.

[5](1929) 18 Calif. Law Rev. 31.

[6]*City of Los Angeles v. Hughes* (1927), 202 Cal. 731.

which may then be paid into court for the benefit of all claimants of record as their interests may later be determined in the same proceeding.[7]

II

Accrual Date of the Right

Before looking for value, the attorney should satisfy himself that the lessee actually had, as a matter of law, a leasehold interest at the date on which the taking by the condemnor occurred. While this should be a simple matter to ascertain, some confusion appears in the appellate reports which may lead him into practical difficulties.

Only property that is actually *"taken* or damaged for public use" need be paid for by the condemning public body.[8] As a matter of law, such taking can occur in either one of two ways. If urgent public necessity requires it, the condemnor can secure an order of immediate possession and physically occupy the premises to the exclusion of the owner and lessee. If no such public urgency exists, then the taking is deemed to occur only after compensation has been determined by a court or jury, an interlocutory judgment has been entered, the compensation paid, and a final order of condemnation made and copy thereof recorded; it is only then that title to the property passes to the condemnor.[9] Where the condemnor takes possession in advance of judgment, therefore, the lessee is entitled to claim compensation if his lease was in existence on the date this occurs. If the condemnor does not take possession in advance of judgment, then the lessee must have a valid, existing lease as of the time of the trial if he is to be heard on its value.[10]

The confusion has arisen out of a mistaken application of section 1249 of the Code of Civil Procedure to the question whether a lessee in a given case has an interest in the property as a matter of law upon which to base a claim. The section, which by its own terms is confined to the function of fixing a standard of valuation, reads in part:

> "For the purpose of assessing compensation and damages the right thereof shall be deemed to have accrued at the date

[7]C.C.P. sec. 1246.1.

[8]Cal. Const., Art. I, sec. 14; *L. A. County Flood Control Dist. v. Andrews* (1921), 52 Cal. App. 788, 793.

[9]*People v. Joerger* (1936), 12 Cal. App. (2d) 665; C.C.P. sec. 1253.

[10]*People v. Auman* (1950), 100 Cal. App. (2d) 262.

> of the issuance of summons and its actual value at that date shall be the measure of compensation for all property to be actually taken, . . ."

Since some date of value is obviously necessary before value can be determined, the Legislature has fixed that of the issuance of summons, except where the case comes to trial more than a year later.[11] However, in at least two reported cases, our appellate courts have treated the date of valuation as the date of taking in dealing with the substantive rights of lessees.

The first of these, *City of Pasadena v. Porter*,[12] is one of the leading cases in this state on the situation wherein only a portion of leased premises is acquired by condemnation, leaving the balance entirely usable for the purposes of the lease. Concerning the accrual date of the lessee's right, however, the decision is more misleading than leading, for the court held without discussion that, in computing the amount due the lessee, the taking of the premises was deemed to have occurred on the day summons was issued. The lessor argued to no avail that the period of reimbursement to the lessee should not begin until the city actually occupied the portion condemned, because the lessee had undisturbed possession of the whole premises long after the statutory date. The other such case was *City of Los Angeles v. Blondeau*.[13] There, the summons was issued on August 6, 1926. A lease was then in effect, which expired on January 31, 1930. Sometime after the latter date, the case was brought to trial, and the lessee received a $6,000 award. Relying on the *Porter* case, the court noted that the statute "fixed a time when the taking of property for a public use is deemed to occur," and that a constructive taking occurred while the lease was still in effect.

Neither the *Porter* nor the *Blondeau* cases mentioned the earlier decision in *Los Angeles County Flood Control District v. Andrews*.[14] This action was brought to condemn the interests claimed by a lessee, after the fee had been acquired by the district by direct purchase. The lease ran from June 1, 1916 to June 1, 1919. The action was filed and summons issued on March 20, 1919, and the trial began July 24, 1919. It was held that the lessee had no right

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[11]See *City of Los Angeles v. Tower* (1949), 90 Cal. App. (2d) 869, 873; *Tom v. Eddy* (1934), 137 Cal. App. 577, 579.

[12](1927), 201 Cal. 381.

[13](1932), 127 Cal. App. 139.

[14](1921), 52 Cal. App. 788.

to the land as of the trial date, and could therefore claim no compensation. The court stated:

> "Appellant contends that its right to the damages is established by the fact that its leasehold was interrupted, in contemplation of law, on March 20, 1919, the date when summons was issued; but the rule that damages are to be assessed in condemnation cases as of the date of the issuance of summons relates only to property actually taken. An anomalous and unbearable condition would be presented if, under the rule, the public could be required to pay for a leasehold interest not taken, but which the lessee held unmolested to the end of the term. . . . Fortunately, such a condition does not exist under the law."

The question remains whether the *Porter* and *Blondeau* cases correctly state the law of California upon the matter at this date. A suggestion has been made that they are distinguishable because both were brought under the Street Opening Act of 1903, rather than under the provisions of the Code of Civil Procedure,[15] but the suggestion was rejected by the Supreme Court in the *Porter* case, where it was said that the difference between the two in this regard was only formal, and not substantial. Several cases involving an order of immediate possession which was made at the same time summons was issued have correctly held that the existence of the leasehold was to be determined as of that date, but the cases used language that obviously indicated that the appellate courts had in mind section 1249 of the Code of Civil Procedure rather than the effect of the order.[16] The cases are distinguishable on the point of possession, but the language used is typical of the confusion that still exists between bench and bar on the matter.

III

Damages Where Entire Leased Premises Are Taken.

Once it is legally determined that the lessee has an existing property interest that is taken in contemplation of law, the question remains as to the amount of compensation that may be due him, for one reason or another. Frequently, in the case of site acquisitions, the entire leased premises are condemned. In such a case the lease is terminated by operation of law, and all further liability of

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[15](1933), 21 Calif. Law Rev. 281.

[16]*People v. Klopstock* (1944), 24 Cal. (2d) 897, 902, citing *City of Los Angeles v. Blondeau, supra; Sacramento etc. Drainage Dist. v. Truslow* (1954), 125 Cal. App. (2d) 478, 488.

the tenant for rent ceases.[17] If in this situation it appears that he is paying his lessor less per month under the lease than the fair rental price current for the premises, then he is entitled to the advantage in the form of the "bonus value" of his lease. For instance, if a lease for a fixed term is based upon a rental payment of $500 a month, and is interrupted by condemnation of the entire leased premises, and it appears as a matter of value that the going rental value, or economic rent, has increased to $750 a month because of a rising market, the lessee is entitled to the difference in the form of compensation for the taking of his leasehold. This "bonus value" may be ascertained by multiplying the monthly difference of $250 by the number of months left to go under the lease, and applying a discount factor to arrive at the present worth of the sum.[18] The result represents the amount that the lessee could sell his lease for on the open market as of the date the leasehold was taken by condemnation, and is an accepted measure of the right of the lessee to compensation under such circumstances.[19]

IV

Damages Where Only Part of Leased Premises Are Taken.

A completely different rule may be applied, however, where only a portion of the leased premises is condemned. The *Porter* case held in such circumstances, where the remainder of the premises was still useful for the purposes of the lease, that the lease was not terminated by operation of law as would be the case if the whole leased premises were taken, and that the obligation of the lessee for the full contract rental continued for the balance of the term. To compensate him, however, he was given an award equal to the proportionate share of the rental of the part taken, for the rest of the term, discounted down to the present value of such future sum. This reduced the lessor's award, of course, who on appeal argued to no avail that this arrangement subjected him to all the risks of the lessee's future solvency. The Supreme Court stated as one reason for its decision, however, that it had no power to reform the lease in such a situation, and thus could not order a *pro rata* reduction in the amount of rent to be paid for the balance of the term.

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[17] *City of Pasadena v. Porter, supra,* 201 Cal. 381, 387, 392.
[18] See Orgel, "Valuation Under Eminent Domain," sec. 124, citing *Yellow Cab Co. v. Howard* (1927), 243 Ill. App. 263.
[19] Horgan, "Some Legal and Appraisal Considerations in Leasehold Valuation under Eminent Domain," (1953) 5 Hastings Law Journal 34.

To the attorney who is satisfied that the *Porter* case contains all the answers to problems of partial taking, a reading of *People v. Ganahl Lumber Co.*[20] will be disconcerting. From an examination of the appellate briefs, it appears that a lumber company had leased some land from a railroad. Part of the land was condemned by the State for highway use, at which time the lease had nearly 23 years to run. The lumber company had constructed some $40,000 worth of buildings and other improvements on the part being condemned. The State settled with the lessor, and the trial was concerned only with the lessee's right to compensation. It received a $25,092 award, consisting of $5,000 for the value of the unexpired portion of the lease, $1,875 for severance to the remaining leasehold estate, $15,000 for the taking of part of its "unified plant," and $33,217 as severance to the rest of the "unified plant." No provision whatever was made for payment by the lessee of the future rental on the part taken, and no credit was allowed the State for its voluntary act in moving the lessee's buildings and machinery over to a new site. The State on appeal complained that, among other things, the court had ignored the *Porter* case, and had given the lessee a windfall in the form of the value of the unexpired lease without obliging the lessee to pay any of it over to the lessor as rent for the rest of the term. The Supreme Court affirmed the judgment, saying only that the lumber company had built its own buildings on the leased premises, whereas in the *Porter* case the lessee did not own the improvements. The two cases indicate the difficulties in the formation of a general standard to apply to any given situation. The *Porter* case, however, seems to be accepted as a rule, if not necessarily the only one, in later decisions dealing with the problem.[21]

V

Damages for the Taking of Fixtures.

The rule governing compensation for the taking of trade fixtures was laid down by our Supreme Court in *People v. Klopstock:*[22]

> "The State's appropriation of land, unless qualified when made, is an appropriation of all that is annexed to the land whether classified as buildings or as fixtures. . . . Trade fixtures are regarded as personalty as between the tenant and owner (of the land) so far as the right of removal is con-

[20](1938), 10 Cal. (2d) 501.
[21]*Sacramento etc. Drainage Dist. v. Truslow* (1954), 125 Cal. App. (2d) 478, 485, 489.
[22](1944), 24 Cal. (2d) 897, 903.

> cerned, but as between the tenant and the condemning party they are regarded as a part of the realty for the purpose of making compensation, so long as they remain fixtures, and where by the exercise of the right of eminent domain they are destroyed or injured in value, damages may be recovered therefor by the tenant. The award made for such fixtures in condemnation proceedings therefore belongs to the tenant. . . ."

In that case, the lessee built an asphalt plant upon the property, which it had leased in 1924 for a period of one year with the privilege of holding over from month to month. This arrangement continued until the property was condemned by the State for highway purposes, an order of immediate possession made and the improvements were thereupon wrecked to clear the right-of-way. Under the terms of the lease, the lessee had the right to remove the improvements it had built upon the property. It was held that, as between the condemnor and all other parties, these improvements were real property and had to be paid for, while as between the lessor and lessee, they were personalty, for the taking of which the lessee was entitled to the award. In its opinion, the court relied upon *City of Los Angeles v. Hughes*,[23] where the same decision was reached in regard to growing nursery stock.

With one exception, our courts have observed the law on fixtures as determinative of the obligation of the condemnor to pay for improvements to the realty, and have held that if such items have been in fact affixed to the premises, compensation is required. Thus, in the *Hughes* case, growing nursery stock was held part of the realty, although it was being offered for sale and would thereupon be severed. In the case of *City of Los Angeles v. Klinker*,[24] the Supreme Court held that a variety of printing presses, lintoype machines, motors, engraving equipment, furnaces, and all the appurtenant paraphernalia required to publish a large metropolitan daily newspaper, were part of the realty and had to be paid for. The fact that some of the equipment physically *could* have been removed was held to be immaterial; it was deemed to be "actually or constructively, an improvement of the real property," and part of an "efficient functioning unit of property."

The one case which appears to be out of harmony with this rule is *County of Los Angeles v. Signal Realty Co.*,[25] where it was

[23](1927), 202 Cal. 731.
[24](1933), 219 Cal. 198.
[25](1927), 86 Cal. App. 704, 710-711.

held that a lessee could not recover the value of certain store fixtures such as screen doors, shelving, window display cases, signs, and awnings, even though these were fastened to the building by nails, screws and bolts. These things, by prior agreement between lessor and lessee, belonged to the latter, and would seem to have come well within the definition of "fixtures" stated in section 660 of the Civil Code. The case is at variance with the rule later laid down by the Supreme Court in the *Klopstock* case, *supra,* but can possibly be distinguished on the ground that testimony was improperly offered as to the separate cost of removal and replacement of the fixtures, rather than in the form of an opinion of the market value of the entire leasehold interest with the fixtures included.

VI

The Last Analysis.

From the foregoing, it becomes readily apparent that, to a lessee, a condemnation suit may quickly become a war on two fronts, with both the lessor and the condemnor taking actions or positions contrary to his continued financial well-being. The preservation—or, more accurately, the salvage—of his rights will depend on accurate legal advice, at an early stage, both to him and to the appraiser he employs to value his interests. The burden thus falls upon his legal counsel to fit the factual situation into one of the case patterns discussed above. There can be a wide variety of such situations, however, depending on the terms of the lease and the type of premises and improvements in each case, and the attorney must be prepared to construct his own pattern, if necessary, in order to protect his lessee client adequately at every stage of these special proceedings.

Inquiry into the Wealth of the Defendant Where Exemplary Damages are Claimed

By Stuart B. Walzer

For reasons best known to themselves, litigants are notoriously shy about disclosing their financial situation to the opposing party. On the other hand, counsel generally exhibits considerable curiosity about this interesting subject. Few sights are as dear to a plaintiff's attorney as the defendant, financial records in hand, sweating profusely on the witness stand. Small bookkeeping discrepancies, never meant for hostile eyes, are magnified in the court room. Delicate and subtle tax entries are exposed to rule and unsympathetic inquiry. It is a rare litigant indeed who can view this prospect with anything approaching equanimity.

Notwithstanding the foregoing statements, the law of California provides ample opportunity for inquiry into the wealth of a defendant. Where exemplary damages are claimed by the plaintiff, evidence of the defendant's wealth is admissible.[1] Exemplary damages may be claimed, not only in tort actions, but in some actions arising out of contractual relationships. Section 3294 of the Civil Code of California provides for the recovery of exemplary damages in actions other than contract:

> "In an action for breach of an obligation not arising from contract, where defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

While this section would appear to confine the recovery of exemplary damages to tort actions alone, recovery is not as restricted as the language of the section might indicate. In some cases involving fraudulent conduct, where such conduct occurs in the course of a contractual relationship, exemplary damages may be recovered. In the case of *Taylor v. Wright*[2] plaintiffs, who had been stockholders in a corporation, sued the directors of the corporation and were awarded exemplary damages. Defendant directors had purchased

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[1]*Greenberg v. Western Turf Association*, 140 Cal. 357, 73 p. 1050; *Tingley v. Times-Mirror*, 151 Cal. 1, 89 p. 1097. A discussion of these cases will be found in part A of this article.

[2]69 C.A. (2d) 371, 159 P. (2d) 980.

the plaintiff's stock at a price well below market value, and in so doing, had failed to disclose certain essential facts affecting the value of the stock. The court, after considering the language of Civil Code Section 3294, held that the action was not based on contract but on fraud. It was held that the fraudulent conduct of the defendants induced the plaintiffs to enter the contract.

Taylor v. Wright indicates that the propriety of a claim for exemplary damages may turn on the theory under which a case is pleaded. While, strictly speaking, a claim for exemplary damages is restricted to the area of non-contractual injury, it appears that in some instances it will extend into the area of contractual relationships as well. Having established this background we proceed to the substance of this article.

The Admissibility of Evidence Pertaining to the Wealth of the Defendant.

The purpose of assessing exemplary damages is twofold. Exemplary damages are assessed for the purpose of punishing the defendant for the past event. Hence the designation "punitive damages," which is used interchangeably with the term exemplary damages. Exemplary damages are also imposed by way of example, and to discourage future excesses.[3] In order that the punitive and the exemplary purposes of assessing exemplary damages be fulfilled,[4] these damages must be proportionate to the means of the guilty person.[5] For this reason it is necessary and desirable that the jury be informed as to the financial status of the defendant.

Several California cases affirm the proposition that evidence of the financial condition of the defendant is admissible where exemplary damages are claimed. In *Greenberg v. Western Turf Association*[6] the plaintiff was refused admission to defendant's race track, though he had purchased a ticket. A judgment was awarded to the plaintiff under a statute making it an unlawful act to refuse admission to places of amusement. In discussing the question of exemplary damages, the court said:

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[3]Restatement of Torts. Section 908(2).

[4]Restatement of Torts. Section 908(2).

[5]See 34 A.L.R. 3, for an annotation discussing this problem in actions of libel and slander.

[6]140 Cal. 357, 73 P. 1050. A case arising between the same parties on similar facts may be found at 148 Cal. 126. This case was affirmed in the Supreme Court of the United States, 204 U.S. 359. The question of admissibility of evidence was not touched upon in the later case.

> "As punitive damages were claimed in this case, evidence of defendant's wealth was admissible for the purpose of graduating the amount which was proper to the award."[7]

And in *Tingley v. Times Mirror*[8] plaintiff brought an action of libel against the defendant. Exemplary damages were claimed. In affirming a judgment for the plaintiff, the court said:

> "It was not error for the court to admit evidence of the value of the property of the defendant. Evidence of that character is admissible where exemplary damages are claimed, and we do not understand the rule as any different whether the defendant is a corporation or an individual."[9]

Consideration of the defendant's wealth, where exemplary damages is allowed, is discretionary.[10] In a case tried without a jury the trial court may refuse to hear such evidence even if it exercises its discretion in favor of awarding exemplary damages.[11] Where the case is tried before a jury, however, it is outside the discretion of the court to exclude evidence of the wealth of the defendant. In such case the court would be taking from the jury evidence which the jury is entitled to consider.[12]

The Question of Timing; at What Point in the Trial Should Evidence of the Defendant's Wealth Be Admitted?

An interesting question arises when we consider the problem of the trial court in relation to the question of admitting evidence of defendant's wealth. The existence or nonexistence of "oppression, fraud, or malice" necessarily turns on the basic motivation of the defendant. Until the machinery of the judicial process can be brought into play the plaintiff may have no means at his disposal by which he can prove or disprove his suspicion of fraudulent conduct. This means that many complaints may contain allegations of oppression, fraud, or malice, with no other foundation than a slight suspicion on the part of the plaintiff that one of these phenomena is present.

The delicacy of the subject matter, touching as it does on the defendant's most private affairs, requires that some protections be erected for the benefit of the defendant. There is always the prob-

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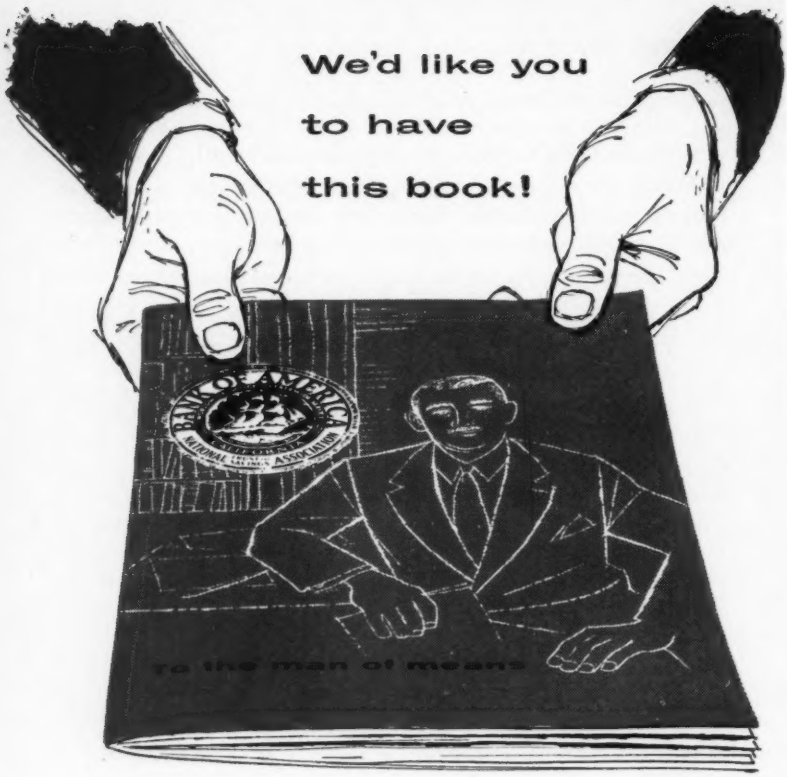
[7]140 Cal. 357, 364.
[8]151 Cal. 1, 89 P. 1097.
[9]151 Cal. 1, 19; see also *Barkly v. Copeland*, 74 Cal. 1, 15 P. 307.
[10]*Bille v. Manning*, 94 C.A. (2d) 142, 210 P. (2d) 254.
[11]Id.
[12]Id.



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lem of the plaintiff who would go on a fishing expedition into the books of the defendant in the hope that he may frighten the latter into an unfavorable settlement.

The language of the cases requires only that a claim for exemplary damages be made in order that evidence of the wealth of the defendant be admissible. Some trial courts, however, have adopted a more stringent requirement. In at least some California trial courts, it is necessary to establish a prima facie case of oppression, fraud, or malice, before inquiry into defendant's wealth will be permitted.[13]

The requirement that plaintiff make out a prima facie case before interrogating the defendant regarding his wealth precludes the use of the pre-trial deposition[14] in gathering information as to finances. Unless plaintiff is in a position to make out a prima facie case by the use of depositions alone, he must postpone his interrogation regarding finances until the time of the trial. However, this results in no legal deprivation of the plaintiff's rights. Since a court has the power to exclude a deposition entirely ". . . if it appears that the taking thereof was in any material respect unfair,"[15] it follows that any portion thereof may be excluded. It can be argued that until plaintiff makes out a prima facie case he has established no justification for his interrogation of the defendant as to the latter's wealth. The court therefore is at liberty to establish a condition precedent to such an interrogation on the grounds that to do otherwise would be to sanction unfair conduct.

Furthermore, as was discussed previously, a court sitting without a jury has the discretionary power to determine whether it will hear evidence regarding the wealth of the defendant. Since the court can exclude this evidence entirely, it can take the lesser step and establish a condition precedent to the hearing of such evidence. We must conclude, therefore, that the courts have it within their

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[13]This point has never been tested. It is the product of the practical experience of the author of this article. The practice has been confirmed to me by several Los Angeles judges and members of the Bar.

[14]Section 2055, California Code of Civil Procedure provides for the examination of an adverse party.

[15]Section 2002, California Code of Civil Procedure reads in part: "A deposition . . . may . . . be read in evidence by either party . . . and is then deemed the evidence of the party reading it; but the court may exclude the same if it appears that the taking thereof was in any material respect unfair."

power to postpone any interrogation of the defendant regarding his wealth until such time as the plaintiff makes out the necessary prima facie case.

Inquiry Into the Wealth of the Defendant Where More Than One Tort-Feasor Is Involved.

We come now to the final problem of our discussion. Where more than one defendant is involved in an action for exemplary damages the majority of American jurisdictions do not permit the plaintiff to inquire into the wealth of the defendants.[16] The jury is at liberty to assess exemplary damages against the defendants but their financial situation is not a proper matter for consideration. The theory underlying this rule is based upon the liability of joint tort-feasors. Since each defendant is liable for the entire amount of the judgment, consideration of the wealth of any of them might result in the imposition of an unjust burden on those less able to pay.[17] For example, an employee who commits a tort might be held liable for exemplary damages based upon his employer's ability to pay. While the judgment for exemplary damages might be directed primarily towards the employer, the employee, as a joint tort feasor, would be liable for the full amount of the judgment.

This issue has never been raised on appeal in California. However, there is good reason to believe that the majority rule could not logically be applied here. The majority rule is based upon the assumption that the defendants will be held jointly liable for both regular and exemplary damages. A recent California case[18] makes it clear that exemplary damages may be apportioned among joint tort-feasors.

In *Browand v. Scott Lumber Company*[19] the plaintiff sued an employee of defendant corporation, joining both the company and its president on the theory of respondeat superior. The trial court rendered a judgment against all three defendants for compensatory damages; and for punitive damages against the corporation and its president. In affirming the trial court's decision the Court of Ap-

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[16]63 A.L.R. 1405; Note: "The authorities that uphold the rule proceed upon the theory that consideration of the individual wealth of one or more defendants would result in an unjust punishment and burden being imposed on defendants less able to pay, where they are all liable jointly."

[17]Id.

[18]*Browand v. Scott Lumber Company*, 125 C.A. (2d) 68, 269 P. (2d) 891.

[19]*Browand v. Scott Lumber Company*, 125 C.A. (2d) 68, 269 P. (2d) 891.

peals made several points. In answering defendant's objections that damages cannot be apportioned among joint tort-feasors, the court made reference to the language of Civil Code Section 3294: ". . . the plaintiff may recover damages for the sake of example and by way of punishing the defendant." Since various defendants may be guilty of varying degrees of culpability, said the court, it follows that exemplary damages may be admeasured and apportioned amongst the various tort-feasors so that each may be punished according to his degree of guilt. The court went on to consider the deterrent factor in exemplary damages. Note was taken of a question posed by one of the jurors during the trial. The juror had requested information regarding the imposition of a fine against the principal defendant in a criminal proceeding arising out of the same factual situation. The jury might have found, said the court, that the principal defendant was sufficiently punished by reason of fines imposed upon him in other proceedings. In assessing exemplary damages against the employer the jury "might well have sought to make the example as well as the punishment fit the offense."

Since it is possible to apportion exemplary damages in California, no reason exists why inquiry may not be made into the wealth of one or more defendants. If the rule were otherwise, a wealthy defendant who was principally implicated in the wrong, might escape the imposition of exemplary damages by associating others in his wrong.[20]

Conclusion.

This article does not attempt to suggest any modification of existing rules regarding the admissibility of evidence pertaining to the wealth of defendants. Rather, it has been confined to an inquiry as to the existing state of the law. It is clear that the admission of such evidence and the time at which such evidence should be admitted involves a nice balancing of interests. California courts appear to be fully conscious of the equitable considerations involved. All the available facts lead to the conclusion that our judiciary has created a fair and equitable procedure in this difficult area of the law.

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[20]*Bell v. Morrison*, 27 Miss. 68, 63 A.L.R. 1409.

Silver Memories

Compiled from the World Almanac and the L.A. Daily Journal of September and October, 1930, by A. Stevens Halsted, Jr.

A. Stevens Halsted, Jr.

Results of the August Bar Examinations show for Los Angeles 164 or 40% of the 414 applicants passing, and for San Francisco 140 or 52% of the 268 applicants passing. Among the fledgling new lawyers are **Gail J. Burck, Richard E. Davis, Gordon E. Dean, John A. Dundas, Frank H. Ferguson, Frederick E. Hines, Wallace B. Jayred, Joseph E. Madden, Grant Ellsworth Meyer, John L. Rowland, John Sobieski, Kenneth S. Sperry, Arthur L. Syvertson, Spencer R. Thorpe, Maynard J. Toll** and **Don F. Tyler.**

* * *

Connie Mack's Athletics downed the St. Louis Cardinals to win the World Series 4 games to 2.

* * *

Roland G. Swaffield of Long Beach and **Guy R. Crump** of Los Angeles have been elected members of the Board of Governors of the State Bar. At the Third Annual Convention held at the Hotel Huntington in Pasadena, **Leonard F. Slosson** has been elected President of the State Bar for 1930-31, succeeding **Charles A. Beardsley** of Oakland.

* * *

The British $5,000,000 dirigible balloon R-101, largest in the world, hit a wooded hill, crashed, exploded and burned up, near Allone, France, on the way from London to India. 47 persons aboard were killed.

* * *

U.S. Senator **Hiram Johnson** has become a member of the San Francisco law firm of **Sullivan & Barry** and **Theodore J. Roche.**

Frank B. Kellogg, former U.S. Secretary of State, has been elected a Justice of the World Court bench. He is co-author with **Aristide Briand** of the pact outlawing war.

* * *

Plans for the proposed new $1,500,000 Los Angeles County Courthouse, to be erected between First and Temple Streets and Broadway and Hill Street, are before the Board of County Supervisors for consideration.

* * *

Charles Francis Adams, Secretary of the Navy, has issued an order decommissioning or converting to training use 46 ships of different types, reducing the enlisted personnel by 4,800 men, and bringing the actual commissioned and operating fleet within the limitations set by the London Naval Arms Treaty. The reduction of tonnage amounts to 120,000 tons.

* * *

With water brought from the River Jordan, Princess **Margaret Rose,** second daughter of the Duke and Duchess of York, was christened in the chapel of Buckingham Palace by the Archbishop of Canterbury.

* * *

The Division of Corporations has sent an order to every broker in California banning the offering of Russian Ruble Bonds and other securities of the Imperial Russian Government, Kerensky bonds and Soviet Government bonds. The offering and sale of these securities is, in the opinion of the Commissioner's office, unfair, unjust and inequitable. The order states that "the United States Government does not maintain diplomatic relations with the governments which issued these securities and it is doubtful that the securities will be recognized by any present or future government of Russia able and willing to pay the obligations."

* * *

Beating all records, Elbert R. Robinson of Chicago accumulated a $10,000,000 debt in the course of a lifetime, with nothing but promotion talk for security. Robinson claimed to be the inventor of the electric trolley and he waged many years of litigation in his efforts to obtain royalties from street car companies.

Los Angeles County Law Library Recent Acquisitions

Antieau, C. J. Municipal Corporation Law, 1955, v. 1.

Antitrust Bulletin, v. 1, no. 1, April, 1955.

Arthur, W. R. The Law of Drugs and Druggists, 4th ed., 1955, 399 p.

Baker, J. N. The Law of Disputed and Forged Documents, 1955. 560 p.

Bernstein, M. H. Regulating Business by Independent Commissions, 1955. 306 p.

Braun, K. Labor Disputes and Their Settlement, 1955. 343 p.

Bridewell, D. A. Credit Unions, Organization, Operation, Questions of Legality, 2d ed., 1955. 422 p.

Casey, L. F. Federal Tax Practice, 1955. v. 1-3.

Chenery, W. L. Freedom of the Press, 1955. 256 p.

Dalzell, G. W. Benefit of Clergy in America, 1955. 299 p.

Davidson, H. A. Handbook of Parliamentary Procedure, 1955. 292 p.

Gough, J. W. Fundamental Law in English Constitutional History, 1955. 229 p.

Guthman, H. G. Corporate Financial Policy, 3d ed., 1955. 766 p.

Hanna, W. L. Federal Remedies for Employee Injuries, 1955. 290 p.

Hausser, R. L. Ohio Practice: Real Property, 1952. 4 v.

Jackson, R. H. The Supreme Court in the American System of Government, 1955. 92 p.

Jowitt, W. A. Some Were Spies, 1954. 223 p.

Lasser Institute. Estate Tax Techniques, 1955. 2418 p.

Lent, G. E. The Ownership of Tax-Exempt Securities, 1955. 140 p.

Lustgarten, E. The Woman in the Case, 1955. 218 p.

Magarick, J. Successful Handling of Casualty Claims, 1955. 495 p.

Marks, H. S. Framework for Atomic Industry, 1954. Various paging.

Neumeyer, M. H. Juvenile Delinquency in Modern Society, 1955. 440 p.

Reeve, H. L. The Influence of the Metropolis on the Concepts, Rules and Institutions Relating to Property, 1954. 205 p.

Ritchie, R. F. Integration of Public Utility Holding Companies, 1954. 339 p.

Santillana, G. The Crime of Galileo, 1955. 339 p.

Stimson, G. H. Rise of the Labor Movement in Los Angeles, 1955. 529 p.

Storke, F. P. Colorado Security Law, 1955. 396 p.

Stretch, G. W. Chartering of Ships, 1953. 2 v.

Tax Institute. Financing Metropolitan Government, 1955. 295 p.

Thorelli, H. B. The Federal Antitrust Policy, 1955. 658 p.

U. S. Federal Power Commission. State Commission Jurisdiction and Regulation of Electric and Gas Utilities, 1954. 39 p.

U. S. Government Printing Office. Bill Style Manual, 1955. 131 p.

United States Trademark Association. Trademark management, 1955. 130 p.

Vanderbilt, A. T. Studying Law, 2d ed., 1955. 753 p.

Woodward, C. V. The Strange Career of Jim Crow, 1955. 155 p.

Brothers-In-Law

By George Harnagel, Jr.

George Harnagel, Jr.

The **Montgomery County (Pennsylvania)** Bar Association for several years has been conducting school children on tours through the county courthouse. The tours begin with a talk by one of the members of the association and are followed by a question-and-answer session. Prizes are subsequently awarded for essays written by the children describing their observations. This idea is spreading to other county bar associations and it has been recommended to the Pennsylvania Bar Association for sponsorship on a state-wide basis.

Thanks to a long forward pass from Walter G. Danielson to Judge Philip H. Richards and a short lateral pass to *Brothers-in-Law,* we are in receipt of a clipping from the *London Times* which reports on a committee session of the Commonwealth and Empire Law Conference as follows:

> "An unusual variety of reasons for the law's delays were given by delegates from abroad . . . on the causes of congestion in the courts. The primary reason—too few judges—was generally agreed."

Among other reasons assigned were the following:

> **New South Wales:** "The inventor of the internal combustion engine. Seventy-five per cent. of the common law actions . . . concerned motor cars."
>
> **Jamaica:** ". . . [T]he necessity of a jury."
>
> **Alberta:** ". . . [W]hen there was no jury . . . jockeying for position in order to appear before the right judge."
>
> **Ceylon:** ". . . [A] tendency to litigate among the lower strata of society . . . What were needed were more social services—libraries and playgrounds to keep people otherwise occupied."

Another delegate, from **New South Wales,** "had a simpler explanation: that lawyers talk too much."

(Continued on page 32)

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Opinion of Committee on Legal Ethics Los Angeles Bar Association

OPINION NO. 225
(April 18, 1955)

OFFICE ASSOCIATION BETWEEN LAWYER-CERTIFIED PUBLIC ACCOUNTANT AND LAWYER ASSOCIATE WHO PREPARES TAX RETURNS AND PERFORMS ACCOUNTING SERVICES. LAWYER ADVISING CLIENTS HE IS A CERTIFIED PUBLIC ACCOUNTANT. OFFICE DIRECTORY LISTING "ATTORNEY-CERTIFIED PUBLIC ACCOUNTANT." It is ethical for a lawyer also a certified public accountant to occupy an office with a lawyer who prepares tax returns and renders incidental accounting services. It is unethical for a lawyer-certified public accountant to list "Certified Public Accountant" after designation "Attorney" in his office building directory. It may or may not be unethical for a lawyer-certified public accountant to advise his clients that he is also a certified public accountant.

A lawyer who is also a certified public accountant requests the Committee's opinion on the following questions:

(1) "Is it a breach of ethics for an attorney and certified public accountant to occupy an office with an attorney-associate who prepares tax returns and who performs certain accounting services incident thereto and in connection therewith?"

(2) "Is it a breach of ethics for a lawyer to advise his legal clients that he is also a certified public accountant, and therefore able to read and understand financial statements and books of account?"

(3) "If the answer to (2) is 'no,' may the lawyer list 'Certified Public Accountant' following the designation 'Attorney' in the directory of his office building, and thus avoid the introduction to a legal client of a subject matter that the lawyer does not want

(a) to appear immodest in mentioning;

(b) to over-emphasize in importance?"

Answering question (1), in our opinion it would not be unethical for the lawyer who is also a certified public accountant to occupy an office with such a lawyer associate so long as both conform to the Canons of the American Bar Association.

We shall next consider question (3) as our discussion of that question is also pertinent to question (2).

A lawyer, also a certified public accountant, may not ethically list "Certified Public Accountant" following the designation "At-

torney" in the directory of his office building, whatever his motive for so doing may be. Such would be a violation of A.B.A. Canon 27 prohibiting advertising or solicitation, direct or indirect.

A.B.A. Legal Ethics Committee Opinion 272, discussing the status of a lawyer who was also a certified public accountant, and Canon 27, states, in part:

> "The Committee all deem it in the interest of the profession and its clients that a lawyer should be precluded from holding himself out, even passively, as employable in another independent professional capacity. We find no provision in the Canons precluding a lawyer from being a C.P.A., or from using his knowledge and experience in accounting in his law practice.
>
> "We are all confident that a lawyer could not, as a practical matter, carry on an independent accounting business from his law office without violating Canon 27.
>
> "The Committee all agree that a lawyer, who is also a C.P.A. may perform what are primarily accounting services, as an incident to his law practice, without violating our Canons. We are also agreed that he may not properly hold himself out as practicing accounting at the same office as that in which he practices law, since this would constitute an advertisement of his services as accountant which would violate Canon 27 as construed in our Opinions."

The vice of a practicing lawyer holding himself out as such and also holding himself out as a C.P.A. is, in the words of Opinion 272, that "his accounting activities will inevitably serve as a feeder of his law practice."

While in his letter of inquiry the lawyer-certified public accountant disclaims that he practices or represents that he practices accounting as such, or that he has ever had a client seek his legal services because of said office directory listing, or that he has such an intention, he also states that said listing serves the purpose of apprising "legal clients . . . that in discussing legal problems with the writer, the writer is capable of understanding and interpreting, and is familiar with, tax matters and tax returns." We would agree that his sign would likely convey such an impression to his legal clients as well as to prospective legal clients; but such a result is an example of the type of activity Canon 27 is intended to prevent.

The lawyer-certified public accountant further states that he specializes in "the corporation and business law field" and that his accounting experience is a material advantage in performing work in that field. While this may well be so, nevertheless a lawyer may

not ethically hold himself out to the public as being an alleged expert or specialist in that or any other field of practice, with perhaps certain limited exceptions not herein involved (Canons 27 and 46).

The prohibition against a lawyer listing "Certified Public Accountant" on a sign likewise extends to letterheads, announcements, cards and other means of publication. Drinker, Legal Ethics, pages 228-248, citing A.B.A. opinions; also Los Angeles Bar Ethics Committee Opinion No. 224.

As to question (2), whenever pertinent to the matter at hand, a lawyer may properly advise clients or those who are seeking his services as a lawyer that he is also a C.P.A. To go further may not only be immodest and undignified and not within the ethical conduct contemplated by the spirit of Canon 29, but also one form of solicitation within Canon 27.

This Opinion, like all opinions of this Committee, is advisory only (By-Laws, Art. X, Sec. 3).

BROTHERS-IN-LAW

(Continued from page 27)

The Testy Testator

The Bulletin of the Riverside County Bar Association vouches for this item of probate lore:

> A number of years ago, the following Will, in part, was offered for probate in Riverside County:
>
> "My last Will—any previous is hereby annulled. To everybody according to his deserts, I being in clear and sound mind, leave and bequest: To my ex-wife, the best rope on the property, so she may use it and not make other peoples' life miserable as she made mine."

* * *

Donald Duck practices law in **Indianapolis**. If you don't believe it, turn to page 731 of the 1955 Martindale-Hubbell Law Directory.

* * *

The **Fort Worth** Bar Association maintains an office in the county courthouse to provide free legal advice for the needy.

* * *

The Women's Auxilliary of the **San Antonio** Bar Association has donated $750 to Trinity University for scholarships for law students.